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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MARY GADE,
Petitioner,
v.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR FLAVOR & EXTRACT MANUFACTURERS' ASSOCIATION AND FRAGRANCE MATERIALS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of the Flavor & Extract Manufacturers' Association of the United States, Inc. ("FEMA") and the Fragrance Materials Association of the United States, Inc. ("FMA") as amici curiae in support of the Respondent and the court below. The brief is filed pursuant to Rule 37.3 with the written consents of both Petitioner and Respondent, the originals of which are being filed separately with the Court.

FMA and FEMA are respectively the national trade associations of fragrance and flavor manufacturers. The fragrance industry produces materials and com-

pounds for incorporation into household and personal care products. The flavor industry produces flavors which are incorporated into manufactured foods and beverages. Both associations represent the majority of manufacturers in their respective industries.

Amici were plaintiffs in one of the consolidated cases reported as *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (*Hughey I*), on appeal after remand, 868 F.2d 621 (3d Cir. 1989) (*Hughey II*), *cert. denied*, 492 U.S. 920 (1989). That action challenged, *inter alia*, the validity of the provisions of the New Jersey "Worker and Community Right to Know Act," N.J.S.A. § 34:5A-1, *et seq.*, that require employers to label containers in the workplace with information regarding their chemical contents. FEMA and FMA charged that such labeling was preempted by § 18(b) of the Occupational Safety and Health Act (hereafter "OSH Act"), 29 U.S.C. § 667(b), and the provisions of the Hazard Communication Standard (hereafter "HCS") promulgated by the Occupational Safety and Health Administration (hereafter "OSHA"), 29 C.F.R. § 1910.1200.[1] The HCS requires employers to label the very same containers with information regarding hazardous substances. In two related decisions, the Court of Appeals for the Third Circuit sustained, with minor exception, New Jersey's labeling provisions because their alleged "primary purpose" was to inform and protect firefighters, police, and the general public rather than the employees who actually work with the containers. As a consequence, FEMA and FMA members with plants in New Jersey now have to label workplace containers with both the information required by OSHA's standard and the discordant information mandated by the state law.

[1] The HCS was promulgated in November 1983, 48 Fed. Reg. 53280, and originally applied only to employers in the manufacturing sector such as the members of FMA and FEMA. It was extended to all employers in 1987. *See* 52 Fed. Reg. 31852.

In the decision below, the Court of Appeals for the Seventh Circuit rejected "purpose" as the test for preemption and instead focused essentially upon what the state regulation at issue actually did. Because this approach, if sanctioned by this Court, presumably would lead to a reevaluation of *Hughey* and the New Jersey labeling law, FMA and FEMA and their members have a vital interest in this Court's decision. In the course of the brief, we also hope to clarify the actual result in *Hughey*, a result which dramatically illustrates the folly of measuring the preemptive effect of § 18(b) by the ostensible "purpose" or "purposes" of the state law or regulation. The *Hughey* decisions are difficult to follow, in part because one must consult two separate but complementary opinions as well as the labeling provisions of both the HCS and the New Jersey law to determine precisely what the court did. As a result, the decsions have not been fully understood by either the courts or the Solicitor General in his amicus brief in support of the certiorari petition in the instant case.

This brief will not deal with all of the issues raised by Petitioner (hereafter "Illinois" or "the State"). We will not address, for example, the State's argument that § 18(b) has no preemptive effect. Instead, we will assume the correctness of the lower court's contrary holding and will address only the test by which such preemptive effect is to be measured.

SUMMARY OF ARGUMENT

Section 18(b) of the OSH Act provides that a state law or regulation "relating to any occupational safety or health issue with respect to which a federal standard has been promulgated" by OSHA is ineffective in the absence of OSHA review and approval. Seeking to avoid the preemptive effect of the statute, Illinois argues that a state law is preempted by a federal standard only if the sole purpose of the state law or regulation is the promotion of

occupational safety. The State's position is at odds with the statute, reason, and the prior decisions of this Court.

Initially, nothing in the language of the statute makes its preemptive reach turn on the ostensible purpose or purposes for which a state acts. Had Congress intended to preempt according to a state's "purpose," it easily could have said so. Moreover, to give controlling effect to a state's purpose would convert the preemption analysis into a meaningless semantic exercise. A state could always avoid preemption simply by attributing a sole or additional purpose to its legislation other than the promotion of occupational safety. The Congressional enactment would be drained of content except in the rare case where a state is not sufficiently artful in drafting its law or regulation.

Congress, aware that the "relating to" preemption provision could affect the states in the exercise of their regulatory authority, provided a safety valve whereby any state that wishes to regulate with respect to an issue covered by a federal standard can do so by submitting a "plan" to OSHA for its approval. If OSHA finds that the regulation proposed by the state would not undermine the effectiveness of the federal program or unduly burden commerce, the state plan will be permitted. Thus, OSHA review insures the integrity of the federal program while accommodating legitimate state regulatory needs.

A "purpose" test would vitiate this protective jurisdiction conferred by Congress upon OSHA. So long as a state took care in characterizing the purpose(s) of its law or regulaiton, it would not have to pass the gauntlet of OSHA review. Surely Congress would not have conferred upon OSHA the role of gate-keeper if it also intended to allow the states to circumvent the process so easily.

In another context, that of ERISA, this Court has emphatically declined to equate "relating to" language

with a state's ostensible purpose. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the Court held that a state law can "relate to" a federal program regardless of the state's purpose in enacting its law, and that measuring preemption solely by a state's "purpose" would be an open invitation to semantic evasion of the Congressional command.

So long as a state law bears more than a wholly tangential and insubstantial relation to an issue covered by an OSHA-promulgated standard, the requirements of § 18(b) must be observed regardless of the state's alleged purpose. Nor does it matter whether the state law or regulation may have an "effect" upon or "relation to" matters other than those dealt with in the federal standard. Nothing in the OSH Act requires that a state law relate *only* to the matters addressed in the federal standard. If a state law addresses the same subject matter as a federal standard, as it does in the instant case, the "relating to" criterion is satisfied.

ARGUMENT

THE "PURPOSE" TEST ADVOCATED BY ILLINOIS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WOULD PERMIT THE STATES READILY TO NULLIFY THE PREEMPTIVE EFFECT OF OSHA STANDARDS

The touchstone to preemption analysis is, of course, the intent of Congress. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). Here, Congress has specified the preemptive effect of a standard issued pursuant to the OSH Act:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a federal standard has been promulgated under Section 655 of this title shall submit a

> a state plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (emphasis added). As this Court has emphasized in another context (ERISA), "[t]he breadth of [the statute's] preemptive reach is apparent from" the "relating to" language, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983), and the courts "must give effect to this plain language unless there is good reason to believe that Congress intended the language to have some more restrictive meaning," *id.* at 97.

Illinois urges this Court to hold that § 18(b) preempts only those state laws or regulations that have as their sole "purpose" promotion of occupational safety. *E.g.*, Petitioner's Brief at 10-11, 33-36. If the purpose of a state's law were to deal with "public safety concerns in addition to occupational safety," it would not be preempted presumably because it is not itself an occupational standard and does not "relate to" occupational safety. *Id.* at 10-11. Of course, preemption would be avoided a *fortiorari* if the *sole* ostensible purpose of a state law were the promotion of "public" rather than occupational safety.[2] In other words, preemption would turn upon how artful a state is in articulating the ostensible purpose(s) of its legislation or regulation.

As Illinois points out, the Courts of Appeals for the First, Second, and Third Circuits have endorsed the "purpose" approach, although each has articulated it somewhat differently. The Third Circuit, which had the first try at the issue, focused on the "primary purpose" of the state's law. *See Hughey I*, 774 F.2d at 595. In practice, this necessarily translated into a holding that a state law would not be deemed preempted if it had "any" purpose

[2] While much of the discussion in the cases and the certiorari papers in the instant case centers on state laws with a "dual" purpose, the objections to a "purpose" analysis are equally valid and applicable even though the *sole* ostensible purpose of a state law is other than occupational safety. The error lies in focusing upon a state's alleged "purposes," not the duality of those purposes.

other than occupational safety, as the court itself appears to have recognized in *Hughey II*. *See* 868 F.2d at 627 (noting that *Hughey I* panel ended its inquiry upon finding a purpose other than occupational safety). And predictably, the Second Circuit, next in line, jettisoned the "primary" component of the test and inquired instead whether the state law had *any* "substantial purpose" other than protecting workers. *See Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 57 (2d Cir. 1988).

Thereafter, the First Circuit held that a state law would be preempted only if the "effect" of the law were *solely* to protect workers. *Associated Industries v. Snow*, 898 F.2d 274, 279 (1st Cir. 1990). Any difference between this approach and the "purpose" test used by the Second and Third Circuits is more apparent than real. To begin with, whether one refers to purpose or effect, the "solely" requirement has no roots in the statute which requires only a "relation" to the issue dealt with by OSHA, not the absence of a relation to anything else. Moreover, while the First Circuit purported not to focus upon the state's purpose, a legislative purpose to protect non-workers inevitably would be deemed dispositive, in practice, with respect to the law's efficacy in achieving such purpose (*i.e.*, its "effect"). Any other outcome would place the courts in the discredited and untenable position of overruling the judgment of the state legislature that its law will have the intended effect. And in *Snow*, the court upheld each of the state regulations at issue on appeal, accepting the state's argument that the public benefitted indirectly from the regulation of workers and their work practices. *See* 898 F.2d at 279-82.

This is not the first time this Court has been urged to hold that Congress, by using the "relation to" language, intended that preemption turn upon a state's purpose in enacting its law or regulations.[3] *Alessi v.*

[3] The "relating to" language is used in a number of other federal statutes. *See, e.g.*, Railway Safety Act, 45 U.S.C. § 434 ("relating

Raybestos-Manhattan, Inc. 451 U.S. 504 (1981), involved an analogous preemption provision in ERISA (29 U.S.C. § 1144(a)) applicable to state laws that "relate to" employee benefit plans.[4] This Court held unanimously that the state law there at issue was preempted, "[w]hatever [its] purpose or purposes" and even though it was "ostensibly regulating a matter quite different from pension plans," because it nonetheless "related to" the matter covered by the federal statute. *Id.* at 524. The Court emphasized that rejection of a "purpose" test was necessary to prevent the states "from avoiding through form the substance of the preemption provision." *Id.* at 525. As the Court earlier had noted in *Perez v. Campbell*, 402 U.S. 637, 652 (1971), an implied preemption case, a "purpose" test would permit states to avoid preemption:

> by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law . . .

The broad preemptive scope of § 18(b) is strongly confirmed by the entirety of the provision. Recognizing that the issuance of federal standards could displace state police power to a significant degree, Congress provided a safety valve whereby states can continue to regulate through the instrumentality of a "state plan," but only if OSHA itself is first satisfied that the effectiveness of its standard will not be undermined by the state system. 29

to railroad safety"); Clean Air Act, 42 U.S.C. § 7543(a) ("relating to the control of [motor vehicle] emissions"). When Congress wishes to preempt according to "purpose," however, it knows how to do so. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (Atomic Energy Act; states may regulate for "purposes other than" those underlying the federal regulation).

[4] Unlike ERISA, where Congress specified the object of the "relating to" language (*i.e.*, employee benefit plans), the OSH Act leaves identification of the object to OSHA—*i.e.*, any issue addressed in an OSHA standard. The preemption test itself, however, is the same.

U.S.C. § 667(c)(2). Had Congress intended OSHA standards to have only the minimal preemptive reach that would result from deference to a state's purpose, there would have been no need for such a carefully crafted procedure for agency review of state regulations.

Allowing a state's purpose to control the analysis would remove any need to utilize the state plan procedure and effectively negate OSHA's responsibility, specifically conferred by Congress, to determine whether a state law may adversely affect a federal standard or unduly burden commerce. These issues would be relegated to the judicial process and the inadequacies of "implied" preemption analysis. OSHA would no longer act as guardian of the integrity of the federal programs, as Congress intended; that role would be left to the federal courts.

Borrowing a thought from *Hughey I* (774 F.2d at 593), Illinois suggests that an OSHA standard cannot preempt a state law that has a purpose—either sole or additional—other than the promotion of occupational safety, because OSHA's authority is limited to the field of occupational safety. Petitioner's Brief at 10. It is Congress, however, not OSHA, who has defined the scope of preemption. Congress surely has the power to fashion a protective jurisdiction over the Congressionally-mandated program by directing that any state program that relates to matters covered by a federal standard must be reviewed by OSHA to determine its possible impact upon the federal program.

Thus, the states can seek to achieve legitimate state purposes in ways that do not relate to the matters addressed in federal standards, or they can follow the state plan route and submit their programs for review by OSHA.[5] Should this Court adopt a "purpose" approach or its equivalent, however, the states would need do

[5] OSHA may reject a proposed state plan only after notice and hearing, and its decision is reviewable in the courts of appeals. 29 U.S.C. § 667(d) and (g).

neither. By simply manipulating the ostensible purpose of their legislation, the "States could do indirectly what they could not do directly. . . ." *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). As the district judge in *Hughey* so aptly concluded when that case was first before him, a purpose test "would permit ready nullification of the Section 18 preemption provision." *New Jersey State Chamber of Commerce v. Hughey*, 600 F. Supp. 606, 622 (D.N.J. 1985).

The statutory test admittedly is not self-administering. Because the state law or regulation must relate to the "issue" dealt with in the relevant federal standard, one must identify and characterize that issue. Moreover, the relation cannot be wholly tangential and insubstantial. But if there is in fact a colorable relation to the issue as so defined, § 18(b) mandates that the state submit its law or regulation for OSHA review even though the state's ostensible purpose, sole or additional, is not occupational health and safety. Nor should it matter that the law or regulation also may have an effect upon or relation to matters other than those dealt with in the federal standard. As noted above, nothing in the statute requires that a state law relate *only* to the matters addressed in the federal standard. Clearly, if a state law addresses the very same subject matter as a federal standard—as it does in the instant case (training of hazardous waste workers) and did in *Hughey* (hazard labeling of containers in the workplace)—the "relation" is indisputable.[6]

We must note, in this connection, that even the analysis articulated by the court of appeals in the instant case might be susceptible to manipulation to circumvent OSHA review. The court used two formulations to describe the

[6] The State's acknowledgment that it intended, even in part, to deal with occupational safety would also seem, on its face, to establish the necessary "relation." In other words, a state's purpose may demonstrate, but not negate, a "relation."

proper inquiry: (1) whether the state law "addresses the same topic as a duly-promulgated OSHA regulation," *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 676 (7th Cir. 1990), and (2) whether the state law "constitutes in a direct, clear, and substantial way, regulation of worker health and safety," *id.* at 679. The first of these is essentially a factual inquiry that is consistent with the language of § 18(b) and requires affirmance of the decision below. The second, however, conceivably could make the inquiry unduly subjective by virtue of the focus upon whether the state is regulating occupational safety. It might open the door to an inquiry focusing again upon whether the state "intended" to do so.

Dicta in the opinion arguably might give some substance to this concern. Thus, the court indicated agreement with *Hughey*'s holding that a state could require employers to label containers of hazardous substances in the workplace, even though OSHA's hazard communication standard deals directly with the identical issue, so long as the state calls the hazards "environmental" rather than "workplace." *See* 918 F.2d at 681; *cf. id.* at 682, n.13 (applying same approach to worker training). The instant court's lapse is explicable, however, because it apparently misapprehended the nature and scope of the workplace labeling at issue in *Hughey*, even at one point making the startling statement that the New Jersey labeling requirements "were not truly workplace regulations." *Id.* at 683.

In fact, the decisions of the Third Circuit illustrate strikingly why a state's "purpose" cannot be the measure of preemption. As noted, OSHA's Hazard Communication Standard, at issue in *Hughey*, is concerned with informing workers of the hazards posed by chemicals in the workplace. The standard requires, *inter alia*, that employers evaluate all chemicals in their plants to determine whether they are hazardous, 29 C.F.R. § 1910.1200(d), and affix to every container of a "hazardous" substance a

label identifying the substance(s) and the specific hazards it may pose, *id.*, § 1910.1200(f)(5). More detailed information regarding the chemicals and their hazards is contained in accompanying material safety data sheets. *Id.* § 1910.1200(g).

The labeling provisions of the New Jersey "Worker and Community Right to Know Act," N.J.S.A. § 34:5A-14, also apply to containers in the workplace (and *only* to such containers), but the scope and content of the labeling differs from that mandated by the HCS. First, the label must identify by chemical name and CAS number[7] any of the more than 2,100 hazardous substances on a list compiled by the state. *Id.*, § 34:5A-14(a). Second, to insure the disclosure of any "substance which is potentially hazardous," the label must identify "the five most predominant substances" in a container by chemical name and CAS number, whether or not they are on the list of hazardous substances. *Id.*, § 34:5A-14(b). This so-called "universal" labeling was explicitly rejected by OSHA when it formulated the HCS. *See* 46 Fed. Reg. 4412, 4427 (1981); 48 Fed. Reg. 53280, 53292 (1983).

In two somewhat convoluted opinions,[8] the court of appeals first held that the New Jersey law *was* preempted in so far as it required labeling of the substances on the list of "workplace" hazardous substances, but not for those substances on the list that New Jersey *also* characterized as "environmental" hazards. The court justified this disparate treatment on the ground that the "primary purpose" of the workplace labeling was the communication of information to workers, except for the "environmental"

[7] "CAS" is an acronym for "Chemical Abstracts Survey," a scientific reference that assigns numbers to chemical substances.

[8] Because the *Hughey I* court never specifically discussed the "universal" labeling requirements, the precise scope of the court's holding was not definitively resolved until *Hughey II*. To determine the full scope of the *Hughey* holdings, the two opinions must be read together.

hazards whose labeling allegedly was for the benefit of firefighters, police, and the public at large. *See* 774 F.2d at 595-96. The court further held that the state's "universal" labeling provision—*i.e.*, the five most predominant substances—was *not* preempted because its purpose also was to communicate information to firefighters, police, and the public at large. *See* 868 F.2d at 627. And finally, in a mind-numbing twist, the court doubled-back and effectively drained its limited preemption finding of any significance whatever by holding that even "workplace" hazardous substances must be labeled under the "universal" provision. *See* 868 F.2d at 627-28. In other words, labeling of these substances was deemed preempted when called "workplace" labeling but was miraculously resuscitated when called something else.

The end result, of course, is that employers must comply with all of the New Jersey labeling requirements with a single and essentially hypothetical exception—*i.e.*, a substance on the list of "workplace" hazards need not be labeled in the unlikely event that it is not among the "five most predominant" in a container. And even then, the exception would apply only so long as the state refrained from also characterizing the substance as an "environmental" hazard.

This bizarre set of tangled holdings demonstrates, we submit, the fallacy in testing preemption by the intent of state legislatures and regulatory bodies rather than that of Congres. The analytical process is transformed into a meaningless semantic exercise. So long as a state uses the right words in describing the purpose(s) of its law or regulation, the threat of preemption evaporates. One would be hard-pressed to imagine a situation in which a state, dissatisfied with an OSHA standard, would not be able to superimpose its own simply by representing that it is intended solely or in part for the protection of firefighters, police, other emergency personnel, or the public at large.

CONCLUSION

The decision of the lower court should be affirmed.

Respectfully submitted,

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